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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 In re:) Case No. 13-53491
12 272 E SANTA CLARA GROCERY, LLC,) CHAPTER 11
13 Debtor.) **EX PARTE APPLICATION TO**
14) **EMPLOY BROKER/AGENT**
15)
16)
17)
18)

18 TO THE HONORABLE STEPHEN L. JOHNSON, UNITED STATES BANKRUPTCY
19 COURT JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, BOSTON
20 PRIVATE BANK & TRUST COMPANY, and all other interested parties:
21

22 Debtor 272 E SANTA CLARA GROCERY, LLC, Debtor and Debtor-in-possession
23 herein (“Debtor” or “Applicant”) request authority to employ Paul Melnyk and Sperry Van Ness
24 | SV Advisors (“Agent/Broker”) to market and sell Debtor’s real property, identified as 272 E
25 Santa Clara Street, San Jose, California, Santa Clara County Assessor’s Parcel Number 467-
26 24-111 (“Property”), more fully described hereinafter, pursuant to Section 327 (a) of the
27 Bankruptcy Code (the “Code”) and Rule 2014 (a) of the Federal Rules of Bankruptcy
28 Procedure (the “Bankruptcy Rules”) (“Application”).

EX PARTE APPLICATION TO EMPLOY BROKER/AGENT

1 **I. Case Background/Status¹.**

2 The following case background and status are presented in summary form to assist to
3 the court with the Application but omit some background and disputed history not essential
4 to the Application.

5 **A. May 2009 Loan to Kimomex.**

6 In May 2009, several investors (collectively the “Investors”) loaned \$635,000 to
7 Kimomex Santa Clara, LLC (“Kimomex”) secured by a deed of trust in second position
8 (“Second DOT”) to Investment Grade Loans, Inc. (“IGL”) as trustee against the Property.
9 The Second DOT was subject to an existing first deed of trust in the amount of
10 approximately \$3.6 million dollars recorded in July 2008 in favor of Boston Private Bank &
11 Trust Company (“BPB”) (formerly known as Borel Private Bank & Trust Company) (the
12 “First DOT”). The Property consisted of 1.4 acres improved with a commercial building of
13 approximately 26,575 square feet originally built in 1966 which was occupied by tenant
14 Kimomex Markets, Inc. which operated a Mexican grocery store business.

15 **B. July 2011 Foreclosure Agreement.**

16 The Mexican grocery store business failed and Kimomex entered into protracted
17 negotiations with a potential new grocery store tenant, i.e. Fresh & Easy, but that deal was
18 never consummated. In March 2011 BPB recorded a notice of default under the First DOT
19 and eventually set a trustee’s sale for July 20, 2011.
20

21 Prior to the sale date, on July 15, 2011 BPB and IGL entered into an “Agreement Re
22 Foreclosure Sale” (the “Foreclosure Agreement”). Under the Foreclosure Agreement BPB
23 agreed that if IGL immediately paid \$380,661.90 to cure the arrearage BPB would postpone
24 the trustee’s sale to after August 17, 2011, and that if IGL made “the regular monthly
25 payment of \$24,307.45 due under the Loan”, then BPB would continuously postpone the
26 trustee’s sale through March 16, 2012.

27 _____
28 ¹Debtor submits that the factual background stated herein is substantively and substantially
undisputed except to note that BPB may disagree with portions not essential to the Application.

1 **C. October 2011 Foreclosure And Second DOT On Empty Building.**

2 In June 2011 IGL recorded a notice of default under the Second DOT. The foreclosure
3 took place on October 24, 2011. At the time of the sale, the unpaid balance was
4 \$1,183,908.74. At the sale, the Investors bid \$100,000, which was the highest bid, and
5 became the owners of the Property, leaving a deficiency balance due on the second loan of
6 \$1,083,908.74. At the time of the foreclosure, the building was empty, there was no tenant,
7 and there was no rental income. Between October 2011 and March 2012, the Investors
8 marketed the Property for lease to potential tenants, found a tenant in March 2012, and
9 eventually paid \$242,000 in leasing commissions. At the same time IGL was paying BPB
10 \$24,307.45 per month.

11 **D. First and Second Amendments to Foreclosure Agreement.**

12 In November 2011 and January 2012, IGL and BPB entered into a “First Amendment”
13 and a “Second Amendment to Agreement Re Foreclosure Sale” (the “Second Amendment”).
14 Under the Second Amendment the parties agreed that if IGL made “the regular monthly
15 payments” for December 2011 through March 2012 of \$24,307.45 then BPB would postpone
16 the foreclosure sale, and if the Investors wanted to pay off the First DOT, BPB would accept
17 \$3.25 million dollars, less the payments made for those months, in full satisfaction of the
18 First DOT. The plan was to have the Property leased and sold by March 2012 in order to pay
19 off the First DOT.
20

21 **E. March 2012-New Tenant and Third Amendment.**

22 In March 2012, the Investors formed 272 E Santa Clara Grocery, LLC (“Debtor”) and
23 deeded their respective ownership interests in the Property to the Debtor. The deed was
24 recorded in April 2012.

25 On or about March 8, 2012, Debtor, as landlord, entered into a 10-year lease for the
26 Property with Grocery Outlet, Inc., a national grocery store chain. During the few years the
27 tenant pays rent of \$39,600 per month. The monthly rent is net of all expenses, including
28

1 property taxes, insurance, and maintenance (except the roof and structure) which are all paid
2 by the tenant.

3 In March 2012, BPB, IGL, and Debtor entered into a "Third Amendment to Agreement
4 Re Foreclosure Sale" (the "Third Amendment"). Under the Third Amendment, the parties
5 agreed that if BPB was paid "the regular monthly payment of \$24,307.45 due under the
6 Loan" then BPB would postpone the trustee's sale through December 31, 2012. The parties
7 further agreed that Plaintiff and Debtor would enter into a Subordination, Non-Disturbance
8 and Attornment Agreement ("SNDA") under which BPB would not disturb the tenant's
9 possession in the event BPB foreclosed, which SNDA was signed on July 26, 2012.

10 In reliance upon the multiple agreements with BPB, Debtor continued to pay BPB
11 \$24,307.45 per month through and including March 2013. Thus, from July 2011 through
12 March 2013, Debtor paid Plaintiff \$380,661.90 to cure the arrearage, plus approximately
13 \$413,219 in monthly payments for a total of \$793,880.90. This is in addition to the
14 approximate \$242,000 for leasing commissions spent to find a tenant. Thus, a total of
15 approximately \$1,033,880 has been spent in reliance upon the agreements with BPB.

16
17 **F. December 2012-Sale of Property and Debtor's Discovery of Environmental**
18 **Contamination and BPB's Non-Disclosure.**

19 In November 2012, Debtor found a buyer and entered into a contract for the sale of the
20 Property for \$7.3 million dollars. The escrow was scheduled to close in December 2012. This
21 sale would have paid off BPB's lien. However, during their due diligence, the buyer
22 discovered that the Property was listed with the State and/or County as undergoing clean-up
23 or investigation due to a possible leak from an old underground storage tank. Specifically,
24 while conducting a Phase I, Environmental Investigation, the buyer discovered the existence
25 of prior reports filed showing that the Property was contaminated. As a result of the
26 discovery, the buyer cancelled the sale.

27 This discovery by the buyer was the first notice that Debtor had of any contamination on
28 the Property. However, Debtor was informed that BPB had been aware of the contamination

1 since 2008, had a copy of a report showing purported contamination, and never disclosed the
2 report or the purported contamination to Debtor. Had BPB disclosed this information to
3 Debtor, Debtor would not have paid BPB \$793,880 to cure the default, made payments under
4 the First DOT, or invested another \$242,000 in leasing commissions to find a tenant.

5 **G. May 2013-Proposed Fourth Amendment, Agreement to Suspend Payments, and**
6 **Release of Claims.**

7 Debtor continued to make the monthly payments to BPB through March 2013. Around
8 that time, BPB, IGL and Debtor negotiated the terms for a fourth amendment regarding the
9 foreclosure sale. Under the terms as negotiated, Plaintiff agreed that so long as Debtor and
10 IGL took certain steps to obtain a “closure and/or no further action letter” regarding the
11 contamination from the required regulatory agency, and to the extent required, pay for any
12 additional environmental investigation, testing, remediation and/or other work, kept BPB
13 apprised of the progress, and obtained a “closure and/or no further action letter” resolving all
14 environmental issues no later than April 30, 2014, then no monthly payments after March
15 2013 would be due, and the foreclosure sale would be continued through April 30, 2014.

16 In reliance upon the agreement that no payments were due after March 2013, Debtor did
17 not make payments pending the drafting and execution of the fourth amendment. The draft
18 fourth amendment was not received until May 2013. Consistent with the negotiations, the
19 draft fourth amendment stated that no payments would be due after March 2013. However,
20 contrary to prior discussions, the proposed “Fourth Amendment to Agreement Re
21 Foreclosure Sale” (the “Fourth Amendment”), required Debtor, IGL, and their predecessors
22 to release BPB from any claims relating to the Property including any environmental issues.
23 As BPB had failed to disclose the environmental contamination to Debtor prior to and during
24 its dealings and did not know the severity of the contamination and cost of remediation,
25 Debtor refused to execute the Fourth Amendment.

1 **H. May 13, 2013-BPB Serves Demand on Tenant to Pay All Rents to BPB.**

2 On or about May 17, 2013 BPB served a “Demand That You Pay Rent To A Party
3 Other Than The Landlord” on the tenant. Debtor received confirmation that the tenant would
4 comply with the demand and pay all rents directly to BPB. In compliance with the demand
5 and commencing June 2013, BPB received and continues to receive all the rent, i.e. \$39,600,
6 directly from the tenant (this rent is about \$15,300 more than the monthly payment). Pre-
7 petition Debtor tendered, and continued to tender, immediate payment of the total arrearage,
8 thereby bringing the obligation current and reinstating the loan. BPB wrongfully rejected this
9 tender.

10 **I. Bankruptcy.**

11 On June 27, 2013, Debtor commenced this Chapter 11 bankruptcy case (“Bankruptcy
12 Case”). No Receiver or Trustee has been appointed, and the Debtor remains a Debtor in
13 Possession pursuant to 11 U.S.C. under Chapter 11 of title 11, United States Code sections
14 1107 and 1108. The bankruptcy was filed to avoid the unnecessary and expensive
15 appointment of a receiver, to prevent BPB’s pending foreclosure, and protect Debtor’s
16 substantial investment and substantial equity.

17 On September 24, 2013, Debtor filed a disclosure statement and plan with a hearing
18 date of November 7, 2013 (Doc#62). On October 7, 2013, the court issued an Order Denying
19 Motion for Order Confirming No Stay with Respect to Rent and Denying Cross-Motion for
20 Use of Cash Collateral (Doc#64). Debtor and BPB are discussing, among other things,
21 BPB’s turnover of post-petition rents and related cash collateral issues.

22 **J. Status of Environmental Issue.**

23 Debtor contracted with ERAS Environmental, Inc. (“ERAS”) to assist Debtor address
24 the environmental issues and secure government clearance so the Property can be sold. On
25 August 26, 2013 the Santa Clara County Department of Environmental Health (“DEH”)
26 advised Debtor that based on their review it appeared that the Property qualified for closure
27 under State Water Resource Control Board Low-Threat Underground Storage Tank Case
28

1 Closure Policy (“LTCP”), no further action was required at that time, and the matter would
2 proceed through the closure process before it was recommended for final closure.

3 **II. Employment of Agent/Broker.**

4 Debtor has retained Agent/Broker to market and sell the Property and believes that such
5 is in the best interests of the Debtor, the estate, and the creditors. Post-petition Debtor and
6 Agent/Broker have continued to market the Property consistent with their pre-petition listing
7 agreement. As Debtor believes it has addressed the environmental issues sufficient to
8 proceed with a market rate sale it wishes to formalize its employment of Agent/Broker,
9 market the Property for sale, sell the Property, compensate the Agent/Broker accordingly,
10 and proceed to address the remaining issues. Therefore, Debtor requests authority to employ
11 Agent/Broker in the marketing and sale of the Property.

12 **A. Agent/Broker.**

13 Sperry Van Ness | SV Advisors focus on serving tenants and owners of office, R&D,
14 retail and industrial real estate in Silicon Valley and beyond and is structured to insure that
15 each client enjoys a real estate solution that meets all of their business and/or investment
16 goals. The culture of teamwork and cooperation within its Silicon Valley team, as well as
17 throughout Sperry Van Ness nationwide, insures that each of its advisors has the ability to
18 leverage a tremendous pool of knowledge and expertise for the benefit of our clients.

19 Paul Melnyk (California Real Estate License #01270795) is a proven performer
20 functioning as a “point person” for new ventures and a solution provider for established
21 entities and private funds. Over the last thirty years, he has gained invaluable technical and
22 business acumen that provides a strong foundation for analyzing clients’ needs and executing
23 favorable results. Prior to joining Sperry Van Ness | SV Advisors, he spent 6 years at Grubb
24 & Ellis Company as Research Director, Portfolio Manager and Agent. In addition, he spent 5
25 years at Cassidy Turley focusing on investments, sales and leasing for private funds, high
26 net-worth individuals as well as public and private companies. As discussed hereinabove,
27 pre-petition Debtor employed Agent/Broker to secure the Property’s current tenant and to
28 market and sell the Property.

1 **B. Terms of Agreement.**

2 The terms of Debtor's employment of Broker/Agent are set forth in the Listing
3 Agreement attached hereto as Exhibit A. In summary, the Listing Agreement provides that
4 Broker/Agent receives a commission of 4% for the sale of the Property.

5 **B. Sale Proceeds.**

6 Debtor, subject to the specific terms of a purchase agreement and to set forth in
7 Debtor's disclosure statement and plan and/or motion to sell, intends to pay, at closing, usual
8 and customary closing costs, including escrow fees or costs and commissions; outstanding
9 real property taxes; and BPB's principal and contract interest; and hold the balance of the
10 funds in a DIP account, including funds to address claims by BPB for default interest, costs,
11 and attorney's fees pending an agreement between Debtor and BPB regarding such disputed
12 issues, an order from this court, confirmation, and/or dismissal of the case.

13 At this time Debtor anticipates that a sale of the Property will, after payment of usual
14 and customary closing costs, outstanding real property taxes, and BPB's outstanding
15 principal and contract interest, leave sufficient funds to satisfy the disputed claims of BPB,
16 administrative claims, and unsecured claims and return monies to the Debtor for distribution
17 to its members.

18 **III. Conclusion.**

19 WHEREFORE, Applicant respectfully requests that it be authorized to employ
20 Agent/Broker on the terms and conditions set forth in this Application or incorporated herein.

21 Dated: October 10, 2013 CAMPEAU GOODSSELL SMITH

22 /s/ William J. Healy

23 William J. Healy
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